No. 2716.

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON SHORT LINE RAILROAD COMPANY,
a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error in the United States District Court for the District of Idaho, Eastern Division.

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Upon Writ of Error From the United States District Court.

STATEMENT OF THE CASE.

This action was instituted by the United States of America against the Oregon Short Line Railroad Company to recover on four counts or causes of action for the alleged violation by a station agent of the defendant company of the act of Congress known as "An Act to promote the safety of Employees and Travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 Stat. L., 1415), alleged to have occurred on four different occasions, to-wit: April 2, 3, 5 and 6, 1915, at Shelley, Idaho, at which times and place it was alleged that,

> "Defendant during the 24 hour period beginning at the hour of 7:00 o'clock a. m. (on each day in question) at its office and station at Shelley in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employe, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine

> hours in said 24 hour period, to-wit: from 7:00 o'clock a. m. on said date to the hour of 8:00 o'clock p. m. on said date,"

the time of alleged termination of duty on each day varying somewhat from the other, but each being in excess of nine hours.

It was further alleged that the station was one continuously operated night and day, and that said employe while required and permitted to be and remain on duty did, by the use of telegraph and telephone dispatch, report, transmit, receive and deliver orders pertaining to and affecting the movement of trains engaged in Interstate Commerce, and demanding a penalty for each alleged violation. (Tr. pp. 8-11).

The defendant for answer to the first cause of action denied that during the 24 hour period beginning at 7:00 o'clock a. m. on April 2, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted said telegraph operator and employee to be or remain on duty for a longer period than nine hours in said 24 hour period, but admitted that he was at said time and place employed by defendant as station agent and telegraph operator, and that on said date he worked as an operator and remained on duty as an operator from 7:00 o'clock a. m. until 12:00 noon, and from 1:00 p. m. on said date to 5:00 p. m. thereof, and that thereafter on said date without the knowledge, permission or consent of the defendant did continuously remain on duty performing clerical work, but not as an operator, until 8:00 p. m. and admitted that at all of said times said station was one continuously operated day and

night (Tr. p. 14); and for further answer alleged that prior to the 2nd day of April, 1915, the defendant had issued and delivered instructions to all agents and operators, including the particular one in question, prohibiting them, and each of them, from working in any capacity or performing any service in excess of nine hours in each 24 hour period in any place continuously operated night and day, but that notwithstanding said instruction and prohibition said A. R. Weston remained continuously on duty as operator for nine hours and thereafter performing clerical services for the additional period alleged in the complaint, but that at all of said times it was without the knowledge, permission or consent of the defendant, or any of its officers or agents, except said servant A. R. Weston, who was at said time acting contrary to the express instruction hereinbefore referred to (Tr. p. 15). The answer was the same in all substantial particulars with reference to each of the other three causes of action, which are here for review.

To the answer filed by the defendant plaintiff moved for judgment on the pleadings as to each of the four counts upon the following grounds:

> "If the truth of the allegations in defendant's answer on file herein contained be admitted such facts are nevertheless insufficient to constitute at law any defense to the allegations of plaintiff's complaint on file herein." (Tr. p. 24).

The motion was argued and submitted to Hon. F. S. Dietrich, Judge of the Court, and by him taken under advisement and decision thereafter rendered sustaining the plaintiff's motion for judgment on the pleadings (Tr. pp. 25-29), and judgment was entered accordingly

in which the total penalty was fixed at Two Hundred ($200.00) Dollars (Tr. p. 30), from which judgment the defendant comes to this court on Writ of Error.

The question raised by the motion for judgment on the pleadings, it will be observed, was whether in a case where the hours of service were violated by an employe, but without his being required or permitted by any officer or agent or other person in the company's employ, and without knowledge to the corporation or any such person, but of his own accord and in violation of the terms of his employment, and his express inhibition, the carrier was guilty of a breach of the statute and subject to a penalty.

SPECIFICATIONS OF ERROR.

1. The Court erred in holding and deciding that the plaintiff was entitled to judgment on each of the first four counts of the complaint.

2. The Court erred in rendering judgment on the pleadings against the defendant in the first four counts of the complaint, and each thereof (Tr. pp. 34-35).

POINTS AND AUTHORITIES.

1. It was not the intention of Congress in the enactment of the hours of service law that the carrier should be absolutely liable for every violation of hours of service by an employe without reference to whether such employe was required or permitted so to do by any superior officer or agent of the company.

Sections 1 and 3, Act of March 4, 1907; (34 Stat. L., 1415-1416).

2. In cases admitting of doubt the intent of the law maker is to be sought in the entire context of the section, statute or series of statutes in pari materia, and general language found in one part of a statute may be restricted in effect to particular expressions employed in another, if such intent appears.

Atkins vs. Fiber Disintegrating Co., 18 Wall., 272, 21 L. Ed., 841, 844;

Brown vs. United States, 113 U. S., 571, 28 L. Ed., 1080;

Smythe vs. Fike, 23 Wall, 380, 23 L. Ed., 47.

3. A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter.

People vs. Ins. Co., 15 Johns., 380;

Atkins vs. Fiber Disintegrating Co., 18 Wallace, 272.

4. This being a penal statute should be strictly construed.

U. S. vs. Harris, 177 U. S., 305, 309, 44 L. Ed., 780, 781.

Bolles vs. Outing Co., 175 U. S., 265, 268, 44 L. Ed., 157, 180.

5. Penalties should not be extended by construction.

A. T. & S. F. R. Co. vs. People, 227 Ill., 278, 81 N. E., 342;

State vs. C. C. C. & St. L. R. Co., 157 Ind., 288, 61 N. E., 669.

6. To "require" or "permit" the performance of any act there must be shown to be (1) knowledge and (2)

"consent" on the part of the person charged with having required or permitted the act.

Gregory vs. U. S., 10 Fed. Cases, 1195, 1197;

Wilson vs. State, 46 N. E., 1050, 1051;

Mitchell Lime Co. vs. Nickless, 85 N. E., 728, 729.

7. A statute which deprives a party of his opportunity of presenting his side of the case, or defense, is unconstitutional.

Luria vs. U. S., 231 U. S., 9, 58 L. Ed., 101;

State vs. Beach, 36 L. R. A., 179.

8. A statute making a rule of evidence conclusive is unconstitutional, in that it deprives one against whom the rule works of due process of law, contrary to the fifth amendment to the Constitution of the United States.

Bailey vs. State of Alabama, 219 U. S., 219;

M. J. & K. Co. vs. Turnipseed, 219 U. S., 35.

9. In establishing a rule of evidence there must be a rational and logical connection between the facts proved and facts presumed.

The common law did not impute to the corporation the knowledge of all its officers and agents, but only when the knowledge was gained while acting for the corporation within the scope of their authority or with reference to the particular transaction.

2 Thompson Corp. Secs., 1646, 1649;

The Distilled Spirits, 11 Wall. (U. S.), 336, 356;

Rogers vs. Palmer, 102 U. S., 263, 268.

ARGUMENT.

I.

THE CARRIER IS NOT LIABLE FOR THE VIOLATION OF HOURS OF SERVICE BY AN EMPLOYE WHERE SUCH VIOLATION OCCURRED WITHOUT THE KNOWLEDGE OR CONSENT OF ANY SUPERIOR OFFICER OR AGENT REQUIRING OR PERMITTING THE OVER-SERVICE.

The statute, in our opinion, makes a clear distinction between officers and agents who may require or permit an employe to work in excess of the periods therein prescribed, and such employe. In Section 1 it is provided "that the provisions of this act shall apply to any common carrier or carriers, their *officers, agents and employees;*" AND thereafter in Section 1 it is provided,

> "The term 'employe' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 3 provides:

> "That any such common carrier or any *officer or agent* thereof *requiring or permitting* any *employe* to go, be or remain on duty in violation of the second section hereof shall be liable to a penalty."

At the outset, then, officers and agents who may require or permit such employees to remain on duty in violation of the statute are put upon a different footing than the employes themselves. The carrier, a corporation, cannot require or permit the employes defined by the statute to be or remain on duty except by the direction or consent of one of those designated superiors, to-wit: an officer or agent, for an employe or other

person cannot be "required" or "permitted" to be or remain on duty except by authority of a superior, as is necessarily implied by the very terms employed, and, on general principle, in order for an employe to be required or permitted to do a thing, permission must flow from some superior source and cannot come from an interior or one of equal rank, and, therefore, authority to violate the statute cannot reside in the employe himself.

We are forced to this conclusion for the further reason that Congress has provided by Section 3 of the Act that in all prosecutions thereunder "the common carrier shall be deemed to have had knowledge of all acts of all its *officers* and *agents*" thereinbefore referred to without extending this presumption against the carrier to embrace "employes," thereby again placing the officers and agents in juxtaposition to the employes theretofore defined.

It must be presumed, therefore, that the words "officers" and "agents," designated in Section 3 of the Act as those persons of whose acts the carrier is deemed to have knowledge were used, and so intended, in the sense in which they were previously used in the same section and other portions of the statute, as representing administrative or superior officers and agents, with the power and authority to require or permit the "employes" to go, be or remain on duty.

> "In cases admitting of doubt the intent of the law maker is to be sought in the entire context of the section, statute or series of statutes in pari materia" and

"General language found in one part of a statute may be restricted in effect to particular expressions employed in another, if such intent appears."

Atkins vs. Fiber Disintegrating Co., 18 Wallace, 272, 21 L. Ed., 841, 844;

Brown vs. United States, 113 U. S., 571, 28 L. Ed., 1080;

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A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter.

People vs. Ins. Co., 15 Johns, 380;

Atkins vs. Fiber Disintegrating Co., 18 Wall., 301;

Smythe vs. Fike, 23 Wall., 380, 23 L. Ed., 47, 49.

This being a penal statute should be strictly construed.

U. S. vs. Harris, 177 U. S., 305, 309, 44 L. Ed., 780, 781;

Bolles vs. Outing Co., 175 U. S., 265, 268, 44 L. Ed., 157, 180.

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Penalties are not to be extended by construction:

A. T. & S. F. R. Co. vs. People, 227 Ill., 278, 81 N. E., 342;

State vs. C. C. C. & St. L. R. Co., 157 Ind., 288, 61 N. E., 669.

See also,

U. S. vs. A. T. & S. F., 220 U. S., 55 L. Ed., 361, 363.

Construing the statute, therefore, according to the foregoing guides of construction, there is no escape from the conclusion that before either the common carrier or any of its officers or agents can be penalized it must be found that one of such officers or agents charged with the duty of supervising and regulating the hours of service of "employes" required or permitted the employe to work in excess of the statutory period and where such employe exceeds the hours of lawful service without being so required or permitted by such an officer or agent so to do, neither the carrier nor such officer or agent can be penalized.

II.

IN PROSECUTIONS UNDER THE STATUTE THE CARRIER IS CHARGED WITH KNOWLEDGE ONLY OF THE ACTS OF SUCH OF ITS OFFICERS OR AGENTS AS HAVE REQUIRED OR PERMITTED AN EMPLOYE TO GO, BE OR REMAIN ON DUTY IN VIOLATION OF THE SECOND SECTION THEREOF.

This conclusion, we believe, follows as a natural corollary of the conclusion arrived at in Point I, for if an *officer or agent* had not *required* or *permitted* an *employe* to be or remain on duty in violation of law, there would be no pertinent knowledge of any officer or agent with which to charge the carrier or officer or agent. For instance, it would not be contended that the Auditor or Treasurer of the company, situated at its general offices, would be subject to a penalty for requiring or permitting an employe, such as the one in this case, to

be or remain on duty for more than nine hours at a continuously operated station, for the words "REQUIRE OR PERMIT" IMPLY AUTHORITY AND KNOWLEDGE OF THE FACT, for while the statute charges the master with knowledge of the acts of its officers and agents, the carrier is not liable unless, being so charged with knowledge, it either causes or consents to the servants working in excess of the hours prescribed; or, to use the words of the statute, unless it shall "*require or permit*" an employe subject to the act to remain on duty in excess of the prescribed hours. In this conclusion we believe we are fully supported both by lexicographers and the courts in the construction of such terms similarly applied:

In Gregory vs. U. S., 10, Fed. Cases, 1195, 1197, the Court says:

> "Webster defines the word (permit) as involving the most positive assent. The word 'permit' is defined thus: 'to grant permission, liberty or leave; to allow, to suffer, to tolerate, to empower, to license, to authorize.' So that to authorize the forfeiture of land used as entrance to an illicit distillery the owner must have knowledge of such use."

In re. Wilmington, 120 Fed., 180, 184, the Court said:

> "One does not *permit* the removal of property who has neither the power nor right to prevent it."

In Wilson vs. State, 46 N. E., 1050, 1051, the Court said:

> "The word permit is more positive than the word allow or suffer, denoting a decided assent, the definition of the word including knowledge of what has to be done under the permission and intention that

what is done is what is to be done; and hence entry of a saloon by a bartender at a time when the sale of liquor is prohibited, without the proprietor's knowledge and against his orders does not render the proprietor liable for a violation of the statute."

See also U. S. vs. San Francisco Bridge Co., 88 Fed., 891, 893.

"Permission implies *both (1) knowledge* and *(2) consent.*"

Stuart vs. State, 60 S. W., 554;

Words and Phrases, Vol. 6, p. 5317.

"The word 'permit' necessarily implies power to prevent."

Mitchell Lime Co. vs. Nickless, 85 N. E., 728, 729.

Permit means to consent after one has knowledge.

People vs. Conness, 88 Pac. (Cal.), 821, 824.

In State vs. Baker, 71 Mo., 475, a woman, in the absence of her husband and against his instructions, sold liquor unlawfully, and in holding that the husband was not criminally liable, the Court said: "The maxim Qui facit per alium facit per se, cited on behalf of the State, is only applicable in criminal cases where the instructions of the principal are obeyed, not where they are, as the evidence offered tended to show, palpably violated."

"To convict the master of the act of the servant, the government must show that the master participated in the act, or countenanced it or otherwise approved it.

"It is not enough that it (the act) was done in the course of the servant's employment in the master's business."

Commonwealth of Mass. vs. Riley, 81 N. E., 881, 10 L. R. A. (N. S.), 1122.

"While a broader rule prevails in respect of a master's civil responsibility for the acts of his servant or agent, ordinarily he is not held responsible criminally unless he in some way participated in, countenances or approves the criminal act of his servant. Ordinarily if a servant does a criminal act in opposition to the master's will and against his orders, though by mistake, the master can not be held criminally responsible. This rule is of general application, though subject to some real or apparent exceptions" (citing numerous authorities).

Commonwealth vs. Stevens, 11 L. R. A., 357, 358.

We are aware that District Judge Rudkin in O. W. R. & N. Ry. Co. vs. United States, 213 Fed., 688, arrived at a different conclusion with reference to the construction of the statute, but we do not feel that his decision is either controlling or persuasive in the case at bar, for it was impossible of attainment in harmony with any accepted rules of construction of penal law, and this court (9th C. C. A.) upon review of the case did not see fit to affirm the decision of Judge Rudkin upon the theory thus announced by him, but quite properly under the facts of the case held (in 223 Fed., 596-599), that in view of the *fact* that the officers of the railroad company charged with the duty of providing

operators left a man on duty at a continuously operated station under such circumstances that he would have to remain until someone was furnished to relieve him, and no one was furnished to relieve him within the nine hour period, that on the *facts* it was not a harsh application of the letter of the statute to hold that the railroad company had knowledge of all of the acts of all of its officers and agents with respect to the excessive employment of Longabaugh, and in conclusion stated:

> "It seems to us that upon the admitted facts the railroad company was charged with *actual notice* of Longabaugh's excessive service."

It cannot be claimed, therefore, that the questions here presented have been heretofore in any manner decided or passed upon by this court.

III.

THE COURT ERRED IN PRESUMING THE DEFENDANT GUILTY, AND IN RENDERING JUDGMENT ON THE PLEADINGS, AND IN SO DOING DENIED THE DEFENDANT THE EQUAL PROTECTION OF THE LAWS, AND DUE PROCESS OF LAW.

There is no positive evidence that the master caused or permitted the employee to work overtime, but, on the case as submitted, the averment of the answer, to the effect that the master did not cause or permit the violation, must be taken as true. That the master knew that the employee was working overtime (though it could not prevent it), is not a matter of fact, but is a purely statutory presumption; and on this presumption you can not base the presumption that the master caused

or permitted the act to be done, for it is well established law that "a presumption can be legally indulged only when the facts from which the presumption arise are proven by direct evidence, and that one presumption can not be deduced from another."

Note to A. T. & S. F. R. Co. vs. Baumgartner, 10 A. & E. Annotated Cases, p. 1096, and cases cited, including: Manning vs. Hancock Life Ins. Co., 100 U. S., 693.

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Also 10 R. C. L., p. 870, and cases reviewed.

The reason for the rule is stated in U. S. vs. Ross, 92 U. S., 281, 23 L. Ed., 709, as follows:

> "They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. * * * * The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. * * * * A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

While it is true that it is within the province of the legislature to enact that proof of one fact shall be prima facie evidence of another, which is the main fact in issue, the inference *must not be arbitrary,* but there must be a rational relation between the two facts.

In Bailey vs. Alabama, 219 U. S., 238-239, Mr. Justice Hughes, quoting from the opinion of the court written by Mr. Justice Lurton in Mobile, Etc., Ry. Co. vs. Turnipseed, 219 U. S., 35, said:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is (only) essential that there should be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another *shall not be so unreasonable as to be a purely arbitrary mandate.* So also it must not under guise of regulating the presentation of evidence operate to preclude the party from the right to present his defense to the main facts thus presumed. * * * It is apparent that a constitutional prohibition cannot be transgressed indirectly by a creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumption is not a means for escape from constitutional restrictions."

The Bailey case, it will be recalled, involved the construction of a provision of the Alabama code which provided that any person who with intent to injure or defraud his employer should enter into a contract in writing for the performance of any act of service, and thereby obtain money or other personal property from such employer and with like intent and without just cause refuse or fail to perform the service, should on conviction be punished by a fine in double the damage suffered, and that the refusal to perform the service should be prima facie evidence of intent to defraud the landlord. Under the protection of this statute a sys-

tem of peonage was being fostered and Bailey was prosecuted and convicted and in due course the proceedings reached the Supreme Court of the United States on Writ of Error. In holding that the legislature of Alabama could not consistently with due process of law enact such legislation, the court said:

> "The law of the state would not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances showing good faith he was helpless. He stood stripped by the statute of the presumption of innocence and exposed to conviction of fraud upon evidence only of breach of contract and failure to pay.
>
> "It is said that we may assume that a fair jury would convict only where the circumstances indicated a fraudulent intent. * * * * The normal assumption is that the jury will follow the statute and acting in accordance with the authority it confers will accept as sufficient what the statute expressly so describes."
>
> See also, Luria vs. U. S., 231 U. S., 8, 58 L. Ed., 101.

Under the construction given in the statute by the lower court, the knowledge with which the defendant was charged was not confined to that of the officers and agents theretofore designated by the statute, or within the meaning or intent thereof, but was held to be the knowledge of the employe himself, and from this the court conclusively presumed either that he had required or permitted himself to violate the statute, or that some officer or agent had required or permitted him to violate the statute, and thereupon closed the door of all

defense, and denies to the railroad company the right to show that no officer or agent within the meaning of the statute had either required or permitted the employe to commit the offense charged.

Upon the presentation of this case in the lower court it was urged that the most that could be claimed under any circumstances for the words of Section 3 providing that "in all prosecutions under this Act the common carrier shall be deemed to have knowledge of all acts of all its officers and agents," within constitutional limitations, was that a presumption be created or a prima facie case made by showing that an employe had worked in excess of the period of lawful service prescribed by Congress. That the case was so presented is fairly deducible from that portion of the opinion of the court appearing at page 27 of the transcript. It is also apparent, we think, from the language employed that the court recognizes itself to be suffering from the necessary embarrassment of being required to deny the defendant the benefit of that portion of the statute enacted for its protection, in order to uphold the contention of the government, for the decision could be arrived at only, by, first, conclusively presuming that the carrier had knowledge of all acts of all "employees" as well as all officers and agents; and, secondly, that the carrier was precluded from showing that the employe had not been required or permitted by any officer or agent to exceed the hours of lawful service, and out of considerations of expediency denied to this defendant the due process of law and equal protections of the laws guaranteed to it by Section 10 of Article 1 and the fifth and fourteenth amendments to the Constitution of the

United States by refusing to apply those universal and firmly established principles of construction to which the defendant was entitled, and which have been heretofore cited. In doing this the court said:

> "It is doubtless true that so interpreted the act is rigorously and may now and then operate harshly upon the carrier, but, upon the other hand, it is apparent that upon the view urged by the defendant it would be a much less efficient means of accomplishing the purpose for which it was designed."

We will concede at once that the statute certainly would be much less efficient for purposes of conviction if the carrier were permitted to present its defense, and show that it had not required or permitted the violation of hours, but we cannot conclude it that was the "manifest purpose" of Congress in so enacting it to conclusively charge the carrier with the knowledge of all employees, and deprive it of the right to be heard in its own defense. If it had been the intention of Congress to penalize the railroad company for the voluntary and unauthorized violation of hours by that human factor, the employe, the same as it did in the Safety Appliance Law with reference to those instrumentalities without volition such as automatic coupler, or other standard safety appliance, it could very easily, and presumably would have framed the hours of service law in language permitting of no doubt, and instead of providing that any common carrier or officer or agent requiring or permitting an employe to remain on duty in excess of the hours therein prescribed, could have provided that whenever any agent or employe should remain on duty in excess of the hours therein provided the carrier should be subject to a penalty. This was not done, however,

and presumably out of consideration of a number of cogent reasons as follows: First, while Congress could within its constitutional authority make the carrier an insurer of the sufficiency and efficiency of Safety Appliances, it could not make it responsible for the criminal act or violation of the statute by an employe without the knowledge, authority or consent of the corporation; secondly, to conclusively presume the carrier to have knowledge and to have required and permitted the act would not only deprive it of the right to defend, but such construction would obviously impute to the carrier something which it had not and could not by any means place itself in a position of obtaining unless it should employ men to constantly watch each employe; thirdly, had Congress intended to have conclusively charged the carrier with the knowledge of all employes as well as with the knowledge of all officers and agents, and intended that one term should be as broad as the other, it would have provided the penalty for the violation of hours of service by employes, and would not have left the door open for employes out of malice or ill-will, or any other reasons that might inspire them, to violate the hours of service with impunity, and conclusively bind the carrier to submission to a penalty therefor, although the corporation should not in fact have or possess that knowledge which the law has always recognized it must have through its administrative officers or agents, or some person acting by its authority in order to charge it with a criminal offense. To quote from the brief of the learned counsel for the Plaintiff in Error in Case No. 2470, heretofore decided by this court, but on a different state of facts.

"Suppose the Government desired to prosecute one of (the employee's) superiors for the violation of the hours of service act, would proof of mere over-service be sufficient? Obviously not. We submit that in a given case the same quantum of proof required to convict the superior officer (officer or agent) is necessary before a conviction of the carrier can be claimed. For when it is shown by proof that the official or agent knew of the over-service and failed to prevent or stop it, then the statute imputes that knowledge to the carrier. A case which binds one convicts the other."

"This statute does not denounce the voluntary service of an employe of a railroad company, but if there shall be voluntary service on the part of an employe plus knowledge of an officer or agent the carrier is bound."

Without such knowledge the corporation cannot be conclusively or otherwise deemed to have required or permitted a violation of law.

That the judgment should be reversed is

Respectfully submitted,

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